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John A. Loporto v. Lucy Z. Hoegemann : Reply Brief

Utah Court of Appeals

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Michael D. Hughes; Samuel G. Draper; Hughes and Read; Attorneys for Defendant and Appellant.

IN THE UTAH COURT OF APPEALS

JOHN A. LOPORTO, Plaintiff/Appellee, v. LUCY Z. (LOPORTO) HOEGEMANN, Defendant/Appellant.	Appellate No. 981114-CA

Argument Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from the Judgment and Orders of the District Court of the Fifth Judicial District, the Honorable James L. Shumate, Presiding.

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I. NOTICE OF TRIAL

Plaintiff argues that defendant had "no reasonable justification" for her nonappearance at trial and states that the plaintiff must exercise due diligence. In this matter, the defendant was contacted by her counsel at 4:50 p.m. on the Friday before a Monday trial setting. Before that time she had no notice of any hearing. Her counsel told her that their was a hearing scheduled for Monday. She was told that she did not need to appear or could appear by telephone. She was not told it was the final trial. (R. 228-9). These facts are uncontradicted on the record. The defendant relied upon the representations of her attorney. Defendant maintains that doing so does not show a lack of due diligence. Clients generally believe their counsel, and should not be required to double-check the docket after being informed by their attorneys about the status of the case. The defendant would not expect that the hearing was the final trial in this matter; there are a bewildering array of conferences and review hearings not requiring the client's attendance in most cases, and this case had more than its share.

Plaintiff takes the meaning of Erickson v. Whenker Int's Forwarders, Inc., 882 P.2d 1147 (1994) out of context. In a Rule 60(b) motion, the moving party must allege that he or she has a meritorious defense. State ex rel. Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983). Erickson clarified that the defense does not have to be perfect, but that a "defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried." The case has nothing to do with whether the appellate court should be substituting its judgment for the trial court's as suggested by plaintiff. Rather, the case held that the trial court should not

deny a Rule 50(b) motion if the defendant's answer presents an issue to be tried. Plaintiff makes no argument in his brief that that is the case here.

II. NOTICE TO APPOINT OR APPEAR

Plaintiff maintains that Rule 4-506 and § 78-51-36 are inapplicable to this case. Rule 4-506(3) is the heart of defendant's argument. Plaintiff, on page 14 of his brief, misquotes the law to this court. Defendant is unable to state whether this is in bad faith or is merely neglect. Defendant begins by stating that "Rule 4-506(3) of Utah Code of Jud. Admin. And Utah Code Annotated § 78-51-36 require that . . ." and then goes on to quote Rule 4-506(2). Rule 4-506(2) includes a provision stating that a withdrawing attorney has to provide notice to "all other parties not in default." Plaintiff apparently hopes to mislead the court by arguing that Rule 4-506 and § 78-51-36 are inapplicable because of default this provision. Although it is clear from Rule 4-506(2) that the attorney must still provide notice to client, regardless of whether the client is in default, this is not defendant's principal argument. Rule 4-506(3) and § 78-51-36 both provide that the necessary notice to appear or appoint counsel must be sent before further proceedings can be held. There is no exception for the party being in default. In any case, the plaintiff's counsel in this matter was given leave to withdraw *before* the defendant's pleadings were stricken and her default entered. (R. 184).

Once the defendant's attorney was allowed the withdraw, the court should not have proceeded to strike the plaintiff's proceedings. Both the statute ("must, before any proceedings are had against him . . .") and rule ("no further proceedings shall be held . . .") demand this result. The proper notice should have been sent by plaintiff's counsel and the trial date re-noticed.

Plaintiff argues that, because the withdrawal took place at trial, there were no new actions initiated against the defendant and the statute and rule were inapplicable. However, neither § 78-51-36 or Rule 4-506(3) make such a distinction. They do not define "further proceedings" as new actions not already scheduled. It is clear that plaintiff may not "initiate" further proceedings in the first sentence of Rule 4-506(3). However, the restriction that "no further proceedings" be held is placed upon the trial court in the second sentence. Otherwise, the first and second sentence of the rule would be redundant. The rule is clear that nothing shall be done on the case until 20 days after the notice to appear or appoint is filed. The court in this matter violated the rule and the statute.

In a further attempt cloud the issues in this matter, defendant relies upon Rule 55(a), Utah R. Civ. P., which provides that parties in default need not be given of any further actions. That rule is inapplicable here, because, as explained above, defendant's counsel withdrew before the defendant was placed in default. After her counsel withdrew, the plaintiff's counsel should have given the notice to appear or appoint and the court should have suspended further proceedings. Instead, the court immediately struck the defendant's pleadings, entered her default, and granted further relief to the plaintiff.

CONCLUSION

The only facts before this court and the trial court were those presented by defendant. Plaintiff filed not affidavit or other evidence in opposition to the motion as required by Rule 4-501(1)(B), Utah Code Jud. Admin. The uncontroverted facts are that: (1) plaintiff's counsel contacted her at 4:50 a.m. on June 19, 1997; (2) he notified her of a hearing on June 23, 1998 at

9:00 a.m.; (3) he notified her that she did not need to appear and that she could appear by telephone; and (4) he did not tell her that it was the final trial in the case. When she did not appear, her attorney withdrew and the court struck her pleadings. Under these circumstances, she is entitled to relief under Rule 60(b) due to mistake, inadvertence, surprise or excusable neglect. Because the property notice was not given to appear or appoint counsel, she is also entitled to relief under Rule 4-506 and § 78-51-36, Utah Code Ann. It is fundamental to our system of justice that both parties should be given an opportunity to present their side of the case. That is all the defendant is seeking.

Dated this 20th day of October, 1998.

Samuel G. Draper, for
Hughes & Read

CERTIFICATE OF SERVICE

I, Samuel G. Draper, certify that on October 20, 1998, I served two copies of the attached Reply Brief of Appellant upon R. Clay Huntsman, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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